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No. 99-0478

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

CHARLES APPRENDI, JR.,
Petitioner,

v.

THE STATE OF NEW JERSEY,
Respondents.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court should decline the invitation of the New Jersey Supreme Court to decide whether New Jersey's hate crime law, N.J.S.A. 2C:44-3e, unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....ii

TABLE OF AUTHORITIES.....iv

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION.....2

II. SUMMARY OF ARGUMENT.....3

III ARGUMENT.....3

1. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional Due Process Under the Fifth and Sixth Amendments by Permitting Courts to Effectively Double Applicable Terms of Imprisonment Upon a Finding that the Defendant "More Likely than Not" Possessed the Requisite Discriminatory *Mens Rea*.....4

2. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional Due Process Under the Fifth and Sixth Amendments by Depriving Defendants of the Benefit of a Jury of Peers and Proof Beyond a Reasonable Doubt of Criminal Intent that is Subject to the Severest Possible Societal Stigma and Disapprobation.....9

CONCLUSION.....12

TABLE OF AUTHORITIES

Case

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 3, 6, 9, 10, 11

Arkansas Educational Television Comm'n. v. Forbes, 523 U.S. 666 (1998) 2

Davis v. United States, 160 U.S. 469 (1895) 7

District of Columbia v. Clawans, 300 U.S. 617 (1937) 10

Duncan v. Louisiana, 391 U.S. 145 (1968) 6, 10

Frazee v. Dept. of Employment Sec., 489 U.S. 829 (1989) 2

Frontiero v. Richardson, 411 U.S. 677 (1973) 10

Hamling v. United States, 418 U.S. 87 (1974) 6

Haupt v. United States, 330 U.S. 631 (1947) 11

Illinois v. Wardlow, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000) 2

In re Winship, 397 U.S. 358 (1970) 5, 6, 8, 9, 12

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999) 3, 7

Leary v. United States, 395 U.S. 6 (1969) 6

Loving v. Virginia, 388 U.S. 1 (1967) 10

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 7, 9, 10

Mullaney v. Wilbur, 421 U.S. 684 (1975) 5, 6, 7, 8, 9

Patterson v. New York, 432 U.S. 197 (1977) 6, 7, 12

Pickett v. Brown, 462 U.S. 1 (1983) 10

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 10

Slack v. McDaniel, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998) 2

Specht v. Patterson, 389 U.S. 605 (1967) 11

Spencer v. Texas, 385 U.S. 554 (1967) 11

St. Louis S.W.R. Co. v. Arkansas, 235 U.S. 350 (1914) 6

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 4, 5, 11

Wyoming v. Houghton, 526 U.S. 295 (1999) 2

Rules & Statute

New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e 3, 4, 5, 9

Rule 403 of the Federal Rules of Evidence 11

Rule 404 (b) of the Federal Rules of Evidence 11

Other Sources

Anti-Defamation League, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) 9

Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States, 1 Syracuse J. of Leg. & Pol. 29 (1995) 4

Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 Boston

Coll. Law Rev. 739 (May 1999) 4

"Are Hate Crime Laws Necessary?", New York L.J., November 1, 1999, p.1 4

What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes, 65 Geo.Wash.Law Rev. 1014 (1997) 4

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998), and *Illinois v. Wardlow*, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

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1 *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, is supporters, or is counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, fails to comport with federal due process requirements pursuant to the Fifth and Sixth Amendments. The statute allows the state's criminal courts to substantially enhance, and in many cases to double, the applicable term of imprisonment imposed upon a defendant upon a finding by a preponderance of the evidence that the defendant possessed the requisite *mens rea*. Further, the statute deprives defendants of the basic due process safeguards of a jury of their peers and proof of the discriminatory motive beyond a reasonable doubt, despite that the criminal intent the statute seeks to redress is (quite appropriately) the subject of the severest societal stigma and disapprobation. Accordingly, the Supreme Court of New Jersey should be reversed, and the case remanded for a retrial consistent with the Petitioner's constitutional protections.

III. ARGUMENT

Petitioner's appeal invites the Court to address constitutional due process issues left unresolved in the Court's recent decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 526 U.S. 227 (1999). Unlike the questions addressed in *Almendarez-Torres* and *Jones*, which related to statutory construction of federal penal statutes, Petitioner's case involves a state criminal statute that has been interpreted by the highest court of that state and found to be consistent with the mandates of federal constitutional due process. Thus, the Court is confronted with a clear and urgent constitutional issue, presented in the equally important context of increasing state criminalization of "hate crimes": Whether a penal statute that permits a court to effectively double the maximum penalty upon conviction of a

crime upon proof by a preponderance of the evidence that the defendant possessed discriminatory intent, without benefit of notice in the charging instrument or trial by jury, offends the Fifth and Sixth Amendments of the United States Constitution. *Amicus* The Rutherford Institute respectfully submits that in the particular context of state "hate crime" legislation, which depends upon a demonstration of a discriminatory motive on the part of the defendant to establish the requisite *mens rea* for the penalty enhancement, due process mandates that such a determination be made by a jury of the defendant's peers, subject to the "reasonable doubt" standard of proof.[2]

1. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional

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[2] The Court's *amicus* notes that the question presented in this case does not address the constitutionality of state "hate crime" statutes under the Fifth and Sixth Amendments *per se*. While the Court declined to find such statutes unconstitutional under the First Amendment to the United States Constitution in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), that decision did not address *prima facie* challenges to hate crimes statutes arising under the due process provisions of the Constitution. The position of the Court's *amicus* expressed herein should not be construed to express an opinion on this issue, which it believes remains an open question. *Cf. Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 Syracuse J. of Leg. & Pol. 29 (1995);Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 Boston Coll. Law Rev. 739 (May 1999); "Are Hate Crime Laws Necessary?" New York L.J., November 1, 1999, p.1; *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 Geo.Wash.Law Rev. 1014 (1997).

Due Process Under the Fifth and Sixth Amendments by Permitting Courts to Effectively Double Applicable Terms of Imprisonment Upon a Finding that the Defendant "More Likely than Not" Possessed the Requisite Discriminatory *Mens Rea*.

The New Jersey Hate Crime Law at issue herein, N.J.S.A. § 2C:44-3, is similar in structure and intent to the hate crime statute reviewed by the Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). *See id.* at 508 U.S. at 482, n.4. On its face, it is a mandatory penalty enhancement statute, providing that a court "shall," upon application of the prosecutor, sentence a person who has been convicted of a crime to an extended term of imprisonment if it finds by a preponderance of the evidence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J.S.A. § 2C:44-3e.

It is a virtual truism that "the primary responsibility for fixing criminal penalties lies with the legislature." *Wisconsin v. Mitchell*, 508 U.S. at 486. On the other hand, the Court has made it equally clear in *In re Winship*, 397 U.S. 358 (1970) and subsequent cases that a legislature may not define criminal statutory elements and penalty enhancements in its own absolute discretion, and that *Winship* mandates inquiry into "substance rather than ... formalism" in determining whether the statute comports with due process. *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). "The rationale of [*Winship*] requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the State ... and to the interests of both the State and the defendant as affected by the allocation of the burden of

proof," the Court has cautioned. *Id.*, quoting *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914). Consequently, the Court's task herein is to assess whether New Jersey has "undermine[d] ... the interests that [*Winship*] sought to protect" by "redefin[ing] the elements that constitute different crimes," *Mullaney*, 421 U.S. at 698, in order to characterize as an aggravating factor a *mens rea* requirement that is actually an element of the crime subject to notice via complaint or indictment, *Patterson v. New York*, 432 U.S. 197, 210 (1977), and the right to a jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Almendarez-Torres, supra*; *Hamling v. United States*, 418 U.S. 87, 117 (1974).

Where the standard of the state's proof is a "preponderance of the evidence," the defendant has essentially the same burden of proof as the state does: whether it is "more likely than not," or in the case of the defendant's burden, less likely than not, that he possessed discriminatory intent. The determination that the defendant committed a reprehensible "hate crime" is thus almost equibly poised between establishing hate and absolving the defendant of animus. The Supreme Court has found sentencing schemes violative of due process where they impose an undue burden upon a defendant to negate a state of mind to avoid culpability. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (state could not impose burden on murder defendant to establish that he acted in the "heat of passion on sudden provocation" to reduce homicide to manslaughter); *Leary v. United States*, 395 U.S. 6 (1969) (due process prohibited penal provision authorizing jury to infer from defendant's possession of marijuana that he knew of the illegal importation).[3] Further,

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[3] *Patterson v. New York* is not contrary to this view. *Patterson* upheld a state murder statute that required an accused to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." 432 U.S. at 198. The Court merely refused to require as a matter of due process that the prosecution negate all circumstances that may constitute affirmative defenses, relying particularly on the fact that the defendant generally has access to the evidence tending to establish such defenses. 432 U.S. at 211. Thus, *Patterson* turned on the difficulty of proving factors extrinsic to the defendant's state of mind, and does not stand for the general proposition that a defendant may be required to prove his state of mind to avoid liability. *Cf. McMillan v. Pennsylvania*, 477 U.S. 79 (1986) ("visible possession of a firearm" not an element of the crime charged; characterizing *Patterson* as rejecting the claim that reasonable doubt standard required whenever a state links the severity of punishment to "the presence or absence of *an identified fact*" [emphasis added].)

"although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." *Mullaney*, 421 U.S. at 702; *cf. Davis v. United States*, 160 U.S. 469 (1895) (reversing murder conviction because trial judge instructed jury is was their duty to convict if the evidence was equally balanced regarding the sanity of the accused). Particularly where, as here, the defendant's failure to overcome the equivocal quantum of proof required by the preponderance standard subjects him to a substantially longer prison term, "due process demands more exacting standards." *Mullaney*, 421 U.S. at 702, n.31. *Jones v. United States, supra*, 526 U.S. at ___, 119 S.Ct. 1215, 1219 ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.") The standard of proof

mandated for proof of an offense represents an attempt to instruct the factfinder concerning the degree of confidence society believes he or she should have in the correctness of factual conclusions. *Winship*, 397 U.S. at 370 (Harlan, J., concurring). The longer the loss of liberty potentially imposed on the defendant, and the higher the degree of stigmatization resulting to the defendant from conviction, the clearer the adjudication must be. *Mullaney*, 421 U.S. at 699-700; *Winship*, 397 U.S. at 363, 364 ("use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.")

The Court in *Winship* rejected the suggestion that there is "only a tenuous difference" between the reasonable-doubt and preponderance standards, finding that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." 397 U.S. at 367-68. Likewise, in striking down Maine's penalty statute in *Mullaney*, the Court observed:

> Under [the preponderance of the evidence] burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.

421 U.S. at 703-04 (emphasis in original), citing *Winship*, 397 U.S. at 372 (concurring opinion). The Court's *amicus* submits that where a defendant is "as likely as not" to be branded with the stigma of being the perpetrator of a hate crime and subjected to a potentially doubled term of imprisonment, it is "far worse" to risk sentencing him as such than to impose a lesser, non-enhanced sentence for the substantive offense. Such a criminal justice regime "systematically ... work[s] to the disadvantage of a criminal defendants," and consequently offends due process. *Almendarez-Torres*, 523 U.S. at 244-45.

2. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional Due Process Under the Fifth and Sixth Amendments by Depriving Defendants of the Benefit of a Jury of Peers and Proof Beyond a Reasonable Doubt of Criminal Intent that is Subject to the Severest Possible Societal Stigma and Disapprobation.

Hate crime statutes are modern statutory creatures that are not analogous to any aggravating factors recognized at common law. *See* Anti-Defamation League, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) (describing Anti-Defamation League's model hate crime statute and noting that over one-half of state statutes based on model statute). While ordinarily the Court will look to the extent to which a factor in criminal prosecution "has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt," *Almendarez-Torres*, 523 U.S. at 255, (Scalia, J., dissenting), quoting *McMillan*, 477 U.S. at 87-88, this analysis is unavailable to the Court in the case of hate crimes legislation. Nonetheless, the Court's construction of hate crime sentencing acts may be informed by its rich history of civil rights

jurisprudence, insofar as hate crime laws are an amalgam of Fourteenth Amendment equal protection jurisprudence and the criminal law. The fundamental principles this Court has derived from the Fourteenth Amendment include heightened standards of proof imposed to justify class-based legislative distinctions. For example, in striking down Virginia's miscegenation statute, the Court declared that "the Equal Protection Clause demands that racial classifications, *especially suspect in criminal statutes*, be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis supplied). *See also Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (heightened scrutiny required for gender-based statutory distinctions); *Pickett v. Brown*, 462 U.S. 1 (1983) (heightened scrutiny required for distinctions based on illegitimacy). Because "the penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,'" *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), quoting *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937), that societal judgment should be subjected to the highest standard of protection for an accused perpetrator of a hate crime, not only to protect the innocent accused, but to preclude a "rush to judgment" in circumstances which have the potential to inflame community sensibilities.

Further, discriminatory animus is an issue that is bound up in the actual commission of the offense, not a predicate circumstance such as the recidivism aggravator reviewed in *Almendarez-Torres, supra*, or similar "identified facts," such as the visible possession of firearm aggravator upheld in *McMillan, supra*. The statute requires proof of discriminatory animus as a substantial factor in the commission of the offense; in other words, it mandates the establishment of a degree of causation in fact. The result in many instances may be a retrial

of the circumstances of the offense to establish the defendant's motivation, a practice the Court has found to implicate due process concerns. *See, e.g., Specht v. Patterson*, 389 U.S. 605, 608 (1967) (defendant convicted for sex crime could not be sentenced under a different statute dealing with sex offenders, since sentencing statute "makes one conviction the basis for commencing another proceeding under another Act ... That is a new finding of fact that was not an ingredient of the offence charged.")

Nor does the concern for inflammation of the jury by proof of discriminatory animus, expressed by the majority in the court below, require placing the decision on the application of the hate crime statute in the court's hands. "Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Wisconsin v. Mitchell*, 508 U.S. at 489; *Haupt v. United States*, 330 U.S. 631 (1947). Although Rule 404 (b) of the Federal Rules of Evidence allows discretionary introduction of evidence of prior acts where probative of, *inter alia*, motive and intent, the prophylactic provisions of Rule 403 of the Federal Rules of Evidence serve to exclude such evidence if it tends to unfairly prejudice the jury. See *Almendarez-Torres*, 523 U.S. at 268-69 (Scalia, J., dissenting); *Spencer v. Texas*, 385 U.S. 554, 561 (1967) ("The defendant's interests [in keeping prejudicial prior convictions from the jury] are protected by limiting instructions and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.")

IV. CONCLUSION

The Court's *amicus* respectfully suggests that while considerable deference should ordinarily be accorded to the policy choices expressed by state legislatures through their penal statutory schemes, an affirmance of the Supreme Court of New Jersey 's decision upholding that state's hate crime statute would, "in the name of preserving legislative flexibility ... drain[] *In re Winship* of much of its vitality." *Patterson v. New York*, 432 U.S. at 216 (Brennan, J., dissenting). Federal due process extends to require that statutory factors that are structured and phrased as sentencing enhancements, yet go directly to the defendant's discriminatory state of mind in perpetrating the charged crime, be construed as elements of the offense, subject to the constitutional safeguards of notice and proof to a jury beyond a reasonable doubt. The decision of the Supreme Court of New Jersey should accordingly be reversed, and the case remanded for a retrial consistent with the Petitioner's constitutional rights of due process.

Respectfully submitted,

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